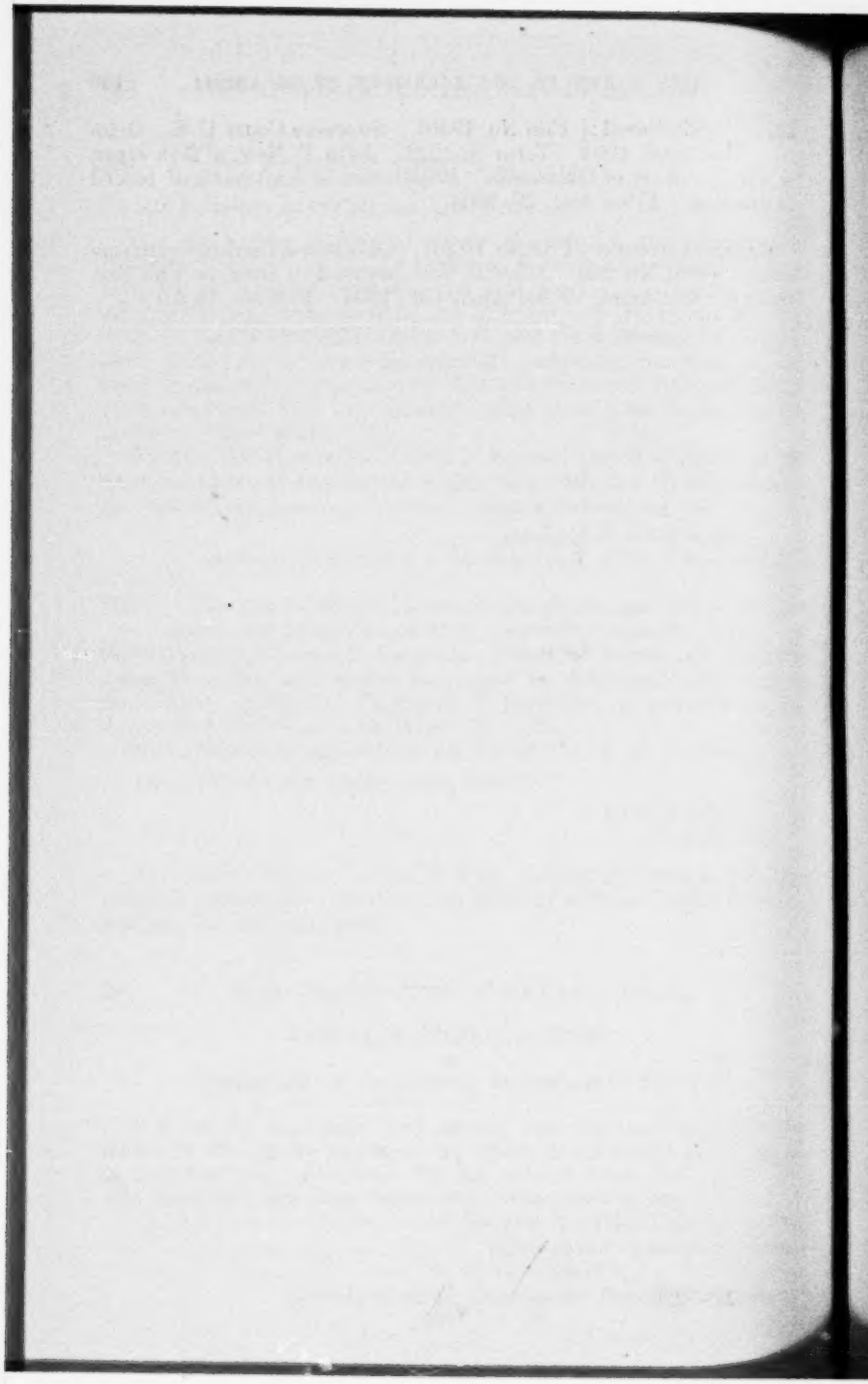

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

Office Supreme Court U. S.
FILED
MAY 2 1904
JAMES H. McKENNEY,
Clerk.

JOHN T. NEW, *Plaintiff in Error,*

vs.

THE TERRITORY OF OKLAHOMA,
Defendant in Error.

No. ~~650~~. 226.

MOTION TO ADVANCE.

The Plaintiff in Error, by John J. Weed, his Attorney, moves the court for an order advancing the above-entitled cause on the docket; and for such early hearing thereof as may be consistent with the other engagements and convenience of the court.

The questions involved are presented in the record certified to this court by appeal from the Supreme Court of the Territory of Oklahoma, and result from the instructions given and refused in the trial of the case of "The Territory of Oklahoma vs. John T. New," who was indicted, tried and convicted of murder in the Territorial District Court of the County of Washita in said Territory, at the term of said court held in May 1901, and sentenced to imprisonment at hard labor for life, and to be confined in the penitentiary at Lansing, Kansas, and the said Plaintiff in Error is there confined and serving said sentence.

The Plaintiff in Error, being the defendant in said criminal proceedings, by his attorneys objected to the rulings and decisions of the trial court as follows:

FIRST ASSIGNMENT OF ERROR.

The trial court erred in refusing to give in charge to the jury special instruction number five requested by the defendant, which refusal was at the time excepted to; which special instruction, as requested, was as follows;

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from

the effects of gunshot wounds, or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant;" which said requested instruction correctly stated the rule of law applicable to the evidence in the case and was demanded by said evidence.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might, under the indictment, be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error, and error to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

THIRD ASSIGNMENT OF ERROR.

The trial court erred in giving to the jury the 19th section of the instructions to the jury, and in charging the jury as follows:

"The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that the defendant New could have withdrawn from the scene of the tragedy with safety, and could have gone away from the scene of action with safety to his life and person without committing the homicide described in evidence, as a matter of law it was his duty to have done so; and if he did not, and you further believe from the evidence, beyond a reasonable doubt, that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of said homicide, then your verdict should be guilty of murder." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and was erroneous in this:

First. It placed upon the defendant the duty, when threatened and approached in a threatening manner upon his own premises, to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of action upon the reasonable appearances of danger, viewed from his

standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and circumstances in evidence" before the jury.

FOURTH ASSIGNMENT OF ERROR.

The trial court erred in instructing the jury in section number 15½ of the instructions, as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm, in the mind of an ordinary courageous man, the law will not justify the killing on the ground of self defense." To which instruction to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this: First, it does not state correctly the rule of law; and, second, it does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

FIFTH ASSIGNMENT OF ERROR.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased; the court in his instructions to the jury using the following language: "before the fatal shot was fired," thereby invading the province of the jury, whose duty it was, and not that of the trial judge, to determine the issue as to how the deceased came to his death and as to whether deceased came to his death in the manner charged in the indictment.

SIXTH ASSIGNMENT OF ERROR.

The trial court erred in refusing to give the jury, as the law of the case, the first special instruction requested by the defendant, as follows: Territory vs. New, No. 1. At the request of the defendant the court instructs the jury as follows:

"The jury are instructed as a matter of law that if a person believes, and has a reasonable cause to believe, that another

has sought him out for the purpose of killing him, or do him great bodily harm, and that he is prepared therefor w a deadly weapon, and the latter makes demonstrations ma festing an intention to commence an attack, then the per so threatened is not required to retreat, but he has a right stand and defend himself, and pursue his adversary (*if ne sary*), until he has secured himself from danger; and if, in doing, it is necessary, or it appears upon reasonable ground be necessary, to kill his antagonist, the killing is excusable the ground of self defense."

Modified by interlineation "(*if necessary*)" and giv Interlineation excepted to and complained of, in par theses, by defendant. C. F. I., Judge.

And the trial court further erred in modifying said first spe requested instruction by interlining the words in parenthe "if necessary," in said special instruction and giving the s to the jury, thereby wholly changing the meaning of requested instruction and depriving defendant of the l right to act upon reasonable appearances as viewed from standpoint; to all of which actions and rulings of the court defendant duly excepted at the time.

This motion is made under the authority of the twe sixth rule of this court, in order that there may be as speed hearing and determination of the errors assigned on the rec as justice may seem to require.

JOHN J. WEED,
Attorney for the Plaintiff in Er

The undersigned, on behalf of the Territory of Oklaho acknowledges the receipt of a copy of the above "Motion Advance," and consents to a hearing of said suit in Supreme Court at such time as that court may order and dir

Attorney for the United States
for the Territory of Oklaho